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October 24, 2017

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Level 3 Communications, LLC v. AT&T Inc. et al., EB Docket No. 17-227, File No. EB-17-MD-003***

Dear Ms. Dortch:

I hereby submit Level 3 Communications, LLC's Reply Brief in Support of Formal Complaint. Please contact me if you have any questions regarding this submission.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones
Counsel for Level 3 Communications, LLC

cc: Lisa Saks
Lisa Boehley
Sandra Gray-Fields

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

LEVEL 3 COMMUNICATIONS, LLC, Complainant, v. AT&T INC., BELLSOUTH TELECOMMUNICATIONS, LLC, NEVADA BELL TELEPHONE COMPANY, PACIFIC BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE, L.P., ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, MICHIGAN BELL TELEPHONE COMPANY, OHIO BELL TELEPHONE COMPANY, AND WISCONSIN BELL TELEPHONE COMPANY, Defendants.	EB Docket No. 17-227 File No. EB-17-MD-003

LEVEL 3 COMMUNICATIONS, LLC'S REPLY BRIEF IN SUPPORT OF FORMAL COMPLAINT

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I. INTRODUCTION AND SUMMARY[1]

In recent private meetings, AT&T apparently persuaded the Wireline Competition Bureau ("WCB") staff to endorse an interpretation of Section 51.907(g)(2), which is intended to implement Step Six of the transition to bill-and-keep for tandem-switched transport access services, that requires a wholesale rewriting of the rule. The result turns the rule from a forward-looking step in the Commission's desired transition to bill-and-keep into a backward policy that indefinitely preserves intercarrier compensation subsidies primarily for AT&T and Verizon, the nation's two largest Price Cap Carriers. But that is not what the Commission's rule provides, or what the Commission intended in 2011.

As adopted by the Commission, Section 51.907(g)(2) states that:

> Beginning July 1, 2017, notwithstanding any other provision of the Commission's rules[,] [e]ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute.[2]

The rule is straightforward and unambiguous: by its plain terms, the rule applies whenever a Price Cap Carrier performs tandem switching and transport functions and the "terminating carrier" is the Price Cap Carrier or one of its affiliates.

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[1] Level 3 files this Reply pursuant to certain waivers granted by the Enforcement Bureau. *See* Letter from Lisa Saks, Assistant Chief, Market Disputes Resolution Division, to Thomas Jones, Counsel for Level 3, and Christopher T. Shenk, Counsel for AT&T, EB Docket No. 17-227, File No. EB-17-MD-003 (Aug. 31, 2017) (Compl. Ex. 6) (waiving the requirement that a complainant's reply contain "proposed findings of fact" and "conclusions of law" and granting "the parties' request to waive the portion of rule 1.726(a) that limits the complainant to addressing, in its reply, only the 'specific factual allegations and legal arguments made by the defendant *in support of its affirmative defenses*'").

[2] 47 C.F.R. § 51.907(g)(2).

In its Answer and supporting brief, AT&T asserts that the words "terminating carrier" in Section 51.907(g)(2) should be construed to mean a "Price Cap Carrier" and no others. Conveniently, this interpretation excludes traffic terminated by AT&T's affiliates and significantly shrinks the scope of calls covered by the rule. But AT&T concedes that this is not what Section 51.907(g)(2) actually says. Instead, AT&T urges that, "[w]hen read in context," the rule should apply "only when the *terminating price cap carrier* also owns the tandem in the serving area."[3] In addition to rewriting this portion of Section 51.907(g)(2), AT&T also claims that the term "affiliate" should apply only in two narrow instances, nowhere described in the rule or *Transformation Order*, further shrinking the scope of traffic covered by the rule. Absent such wholesale reformation, AT&T contends that giving these terms their plain meaning and effect in Section 51.907(g)(2)—as Level 3 has done—would render the rule "nonsensical."[4]

In fact, as shown below, the "context" AT&T relies upon in no way supports AT&T's view, but rather is fully consistent with Level 3's interpretation of the rule. Moreover, Level 3's interpretation of the plain language of the rule makes perfect sense, adheres to established canons of interpretation, and serves the Commission's desired transition to bill-and-keep as the default methodology for intercarrier traffic. In contrast, AT&T's rewriting of Section 51.907(g)(2) ignores the defined and customary meaning of its terms and *undermines* the Commission's goals for the transition to bill-and-keep.[5]

Nor can AT&T rely on "informal" guidance from WCB staff, apparently repeated in the September 2017 *Record Refresh Public Notice*, as an excuse to ignore the rule's plain meaning.

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[3] AT&T Brief in Support of Answer at 22 ("AT&T Br.") (emphasis in original).

[4] *See id*. at 3, 17, 23, 25, 26.

[5] *See* Formal Complaint of Level 3 Communications, LLC ("Compl.") ¶¶ 25-57.

Although the WCB staff may provide *administrative* guidance on tariffing issues, it has no authority to render substantive interpretations of Section 51.907(g)(2), much less rewrite its terms. Such a result would be especially suspect where, as here, there is no indication that any entities other than Price Cap Carriers were privy to such discussions with staff or had a chance to be heard on the scope of the rule.

AT&T's reliance on the *Transformation FNPRM* is similarly misplaced. The issues raised there do not in any way provide support for AT&T's rewriting of Section 51.907(g)(2), but are instead fully consistent with the plain meaning of that section.

In the end, AT&T's rewriting of Section 51.907(g)(2) benefits essentially two companies: AT&T and Verizon. Both companies have market-leading Price Cap Carrier and CMRS affiliates; in addition, AT&T has been aggressively transitioning wireline customers from its traditional POTS offering (which, AT&T concedes, *are* subject to the step-down) to its U-Verse offering (which AT&T, contrary to the rule, claims are *not* subject to the step-down). AT&T has every reason to rewrite the Commission's rules and mischaracterize the *Transformation Order and FNPRM* in these ways in order to maintain its historical access charge revenue stream and shield calls terminated to its CMRS affiliate's and U-Verse affiliate's customers from the transition to bill-and-keep. But Section 51.907(g)(2) is not the "AT&T and Verizon access charge preservation rule." AT&T's self-serving interpretation of Section 51.907(g)(2) should be rejected.

II. AT&T'S INTERPRETATION OF SECTION 51.907(g)(2) REQUIRES A WHOLESALE REWRITING OF THE RULE THAT UNDERMINES THE COMMISSION'S POLICY OBJECTIVES FOR THE TRANSITION.

A. Section 51.907(g)(2) is a forward-looking rule that applies the Step Six transitional rate to traffic that traverses a Price Cap Carrier's tandem and is terminated by a Price Cap Carrier or its affiliate.

In its brief, AT&T wrongly contends that Level 3's straightforward interpretation of Section 51.907(g)(2) is grammatically "nonsensical" and would expand the scope of the rule to a sweeping, virtually unlimited number of calls.[6] That argument is absurd. By its plain terms, Section 51.907(g)(2) says that a Price Cap Carrier can only charge the maximum rate of $0.0007 (the "Step Six transitional rate") for tandem-switched transport access services that it provides in the stated circumstances (i.e., when the Price Cap Carrier or one of its affiliates is the "terminating carrier").[7] Nothing about this straightforward reading of the rule extends the Step Six transitional rate to an unlimited universe of calls, as AT&T wrongly contends. When the Price Cap Carrier provides tandem-switched transport access services, it can collect the appropriate charge, as set forth in the rule; when it does not, the rule has no application. Rather than involving any grammatical imprecision, AT&T's mischaracterization of the rule reflects an obvious—and weak—attempt to obfuscate its plain meaning.

Specifically, Section 51.907(g)(2) applies only to traffic that traverses a Price Cap Carrier's tandem. When a Price Cap Carrier (a) performs a tandem switching function and delivers traffic to a terminating carrier, and (b) the terminating carrier, or an affiliate of the terminating carrier, owns the tandem, then (c) the Price Cap Carrier may charge a maximum of

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[6] AT&T Br. at 3, 17, 23, 25.

[7] To be sure, the rule is part of Section 51.907, entitled "Transition of price cap carrier access charges." 47 C.F.R. § 51.907.

the Step Six transitional rate. As used in Section 51.907(g)(2), the term "Price Cap Carrier" means a Price Cap ILEC, as defined by Commission rule.[8] In addition, as Level 3 has shown, the term "affiliate" is defined in the Communications Act and must be given its proper statutory meaning in the rule—that is, a person or entity "that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person," where "ownership" means "an equity interest (or the equivalent thereof) of more than 10 percent."[9] The term "terminating carrier" must likewise be given its ordinary meaning as used by the Commission in virtually all other contexts—that is, the entity that performs end office switching functions or their equivalents.[10] Far from being a "free-floating"[11] and "unbounded"[12] interpretation of this term, as AT&T wrongly suggests, applying the ordinary meaning of "terminating carrier" is essential to give proper effect to the plain language and purpose of Section 51.907(g)(2).

To be sure, there are many situations in which application of the Step Six transitional rate is required under this straightforward construction of Section 51.907(g)(2), which furthers the

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[8] *See id.* § 51.903(f).

[9] 47 U.S.C. § 153(2); *see* Compl. ¶¶ 29-31.

[10] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554 ¶ 510 (2011) (referring to the "called party's carrier" as the "terminating carrier"); *see* 47 C.F.R. § 51.701 (similarly defining "termination" in the context of non-access traffic as "the switching of Non-Access Telecommunications Traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises"); *see also* Compl. ¶ 28.

[11] AT&T Br. at 23.

[12] *Id.* at 3.

transition to bill-and-keep. But, contrary to AT&T's claims about the "unbounded" nature of this plain language construction, there are also many situations in which the Step Six transitional rate does not apply. Most importantly, the Step Six transitional rate does not apply where the Price Cap Carrier has no relationship with the recipient of the call, i.e., where the terminating carrier is not an affiliate of the AT&T Price Cap Carrier entity that owns the tandem. The examples provided in the table below demonstrate that the plain-meaning application of Section 51.907(g)(2) does not leave the rule "unbounded,"[13] while AT&T's reading unreasonably restricts the scope of calls the Commission intended to be covered by the rule.

[13] *Id*.

Plain-Meaning Application of Section 51.907(g)(2) Compared to AT&T's Unreasonably Restrictive Reading of the Rule

Scenario	Plain-Meaning Reading	AT&T's Reading
1. A Level 3 customer's call traverses a **PacBell tandem switch** before terminating at a **PacBell end office**, where it is routed to a **PacBell subscriber**.	Apply the transitional $0.0007 rate in Step Six; transition to bill-and-keep in Step Seven.	Apply the transitional $0.0007 rate in Step Six; transition to bill-and-keep in Step Seven.
2. A Level 3 customer's call traverses a **Nevada Bell tandem switch** before terminating at **Nevada Bell-**affiliate **PacBell's end office**, where it is routed to a **PacBell subscriber**.	Apply the transitional $0.0007 rate in Step Six; transition to bill-and-keep in Step Seven.	Apply the transitional $0.0007 rate in Step Six; transition to bill-and-keep in Step Seven.
3. A Level 3 customer's call traverses a **PacBell tandem switch** before terminating at **PacBell-**affiliate **U-Verse's gateway**, where it is routed to a **U-Verse subscriber**.	Apply the transitional $0.0007 rate in Step Six; transition to bill-and-keep in Step Seven.	Do not transition to bill-and-keep; continue indefinitely to assess a higher third-party rate.
4. A Level 3 customer's call traverses a **PacBell tandem switch** before terminating at **PacBell-**affiliate **AT&T Mobility's switch**, where it is routed to an **AT&T Mobility subscriber**.	Apply the transitional $0.0007 rate in Step Six; transition to bill-and-keep in Step Seven.	Do not transition to bill-and-keep; continue indefinitely to assess a higher third-party rate.
5. A Level 3 customer's call traverses a **PacBell tandem switch** before terminating with an unaffiliated **Verizon Wireless switch**, where it is routed to a **Verizon subscriber**.	Do not transition to bill-and-keep; continue indefinitely to assess a higher third-party rate.	Do not transition to bill-and-keep; continue indefinitely to assess a higher third-party rate.
6. A Level 3 customer's call traverses a **PacBell tandem switch** before terminating with an unaffiliated **Verizon Fios gateway**, where it is routed to a **Verizon Fios subscriber**.	Do not transition to bill-and-keep; continue indefinitely to assess a higher third-party rate.	Do not transition to bill-and-keep; continue indefinitely to assess a higher third-party rate.
7. A Level 3 customer's call traverses a **PacBell tandem switch** before terminating with an unaffiliated **rural LEC's end office**, where it is routed to a **rural LEC subscriber**.	Do not transition to bill-and-keep; continue indefinitely to assess a higher third-party rate.	Do not transition to bill-and-keep; continue indefinitely to assess a higher third-party rate.

As these examples demonstrate, proper application of Section 51.907(g)(2) is not complicated. Giving proper meaning and effect to the plain terms of the rule furthers the transition to bill-and-keep for traffic that traverses a Price Cap Carrier's tandem and terminates at an end office owned by the Price Cap Carrier or its affiliate in the logical and forward-looking manner that the Commission intended. It does not, as AT&T wrongly suggests, expand the rule to apply "when any carrier that could be characterized as a terminating carrier, no matter who it is, has traffic traversing its tandem,"[14] such that "all Price Cap Carriers can simultaneously charge for all tandem traffic in the country."[15] That is not what the rule provides, and that is not what Level 3 has argued.

B. AT&T's rewriting of Section 51.907(g)(2) is inconsistent with the language of the rule.

As shown in Level 3's Complaint, there are obvious reasons why AT&T would prefer to rewrite Section 51.907(g)(2) in the wholesale fashion it has proposed. By limiting application of the Step Six transitional rate to traffic that traverses an AT&T Price Cap Carrier-owned tandem and also terminates with an AT&T Price Cap Carrier (but no other "terminating carrier"), AT&T's preferred formulation of the rule (a) strictly limits the transition to bill-and-keep to a shrinking volume of legacy voice traffic, and (b) shields the growing volume of traffic that terminates with non-Price Cap Carrier AT&T affiliates from the transitional framework indefinitely.[16] But the Commission was well aware of these marketplace trends when it adopted

[14] *Id.* at 24.

[15] *Id.* at n.49.

[16] *See* Compl. ¶¶ 32-52.

Section 51.907(g)(2).[17] This forward-looking rulemaking decision was essential to promote the transition to bill-and-keep in the orderly steps intended by the Commission.

Allowing Section 51.907(g)(2) to be rewritten as AT&T urges would contravene the plain language of the rule. AT&T's attempt to substitute "Price Cap Carrier" for the term "terminating carrier" violates hornbook canons of textual interpretation. Where a term is used in one part of a statute or regulation, but not in another, the inclusion or exclusion of the term is presumed to be purposeful.[18] The Commission has consistently applied this canon in its own

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[17] *See, e.g.*, *See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 ¶ 9 (2011) ("*Transformation Order*" or, where appropriate, "*FNPRM*"), ("[T]he [existing intercarrier compensation] system is eroding rapidly as consumers increasingly shift from traditional telephone service to substitutes including [VoIP], wireless, texting, and email."), *aff'd sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014); *id.* ¶ 63 ("Increasingly, however, consumers are obtaining voice services not through traditional means but instead through interconnected VoIP providers offering service over broadband networks. As AT&T notes, '[c]ircuit-switched networks deployed primarily for voice service are rapidly yielding to packet-switched networks,' which offer voice as well as other types of services. The data bear this out. As we observed in the *Notice*, '[f]rom 2008 to 2009, interconnected VoIP subscriptions increased by 22 percent, while switched access lines decreased by 10 percent.'") (internal citations omitted); *id.* ¶ 648 ("[A]s demand for traditional telephone service falls . . . consumers [are] increasingly opting for wireless, VoIP, texting, email, and other phone alternatives."); *id.* ¶ 748 ("The potential for benefits [of a transition to bill-and-keep] to wireless customers is particularly important, as today there are approximately 300 million wireless devices, compared to approximately 117 million fixed lines, in the United States."); *id.* ¶ 750 ("[W]ith the substantial elimination of termination charges under a bill-and-keep methodology, a wide range of IP-calling services are likely to be developed and extended, a process that may ultimately result in the sale of broadband services that incorporate voice at a zero or nominal charge. All these changes will bring substantial benefits to consumers.").

[18] *See Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

jurisprudence.[19] Here, the Commission has defined "Price Cap Carrier" within Part 51 of its rules to mean a "Price Cap ILEC."[20] This defined term is different from, and may not be conflated with, the term "terminating carrier," which has its own well-established meaning under Commission precedent. As Level 3 has explained, "Price Cap Carriers" are a subset of "terminating carriers," which, in turn, include *any* party that performs the function of call termination.[21] If the Commission had meant for "terminating carrier" to have exactly the same meaning as "Price Cap Carrier," it would have said so in the rule.

Other canons of textual interpretation also preclude artificially limiting the term "terminating carrier" to mean the same thing as "Price Cap Carrier." Where, as here, a term in a rule is broad and unambiguous, the absence of any text limiting its normal meaning "'does not

[19] *See, e.g.*, *Numbering Policies for Modern Communications; IP-Enabled Services; Telephone Number Requirements for IP-Enabled Services Providers; Telephone Number Portability; Developing a Unified Intercarrier Compensation Regime; Connect America Fund; Numbering Resource Optimization*, Report and Order, 30 FCC Rcd. 6839 ¶ 80 (2015) (explaining that where Congress wanted to limit certain rights or obligations to telecommunications carriers or telecommunications services, it knew how to do so expressly, and concluding that the absence of an express limitation in Section 251(e)(1) supports the finding that Congress did not intend to limit the Commission's flexibility to extend direct access to numbers to interconnected Voice over Internet Protocol ("VoIP") providers); *Implementation of Competitive Bidding Rules to License Certain Rural Service Areas*, Report and Order, 17 FCC Rcd. 1960 ¶ 17 (2002) (finding that Congress used the term "commercial mobile services" where it referred to wireless services like cellular in the Communications Act, and "commercial radio and television stations" therefore cannot be interpreted to include non-broadcast wireless facilities); *Sonshine Family Television, Inc.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd. 18686 ¶ 13 (2007) (finding that where a statute and corresponding rule expressly excluded "nominal" monetary payments for some purposes, but not for purposes of the sponsorship identification requirements, which applied to the payment of "any money, service or other valuable consideration," the licensee's receipt of "nominal" payments from a sponsor was subject to the statute and rule).

[20] 47 C.F.R. § 51.903(f).

[21] *See* Compl. ¶ 28 & n.46.

demonstrate ambiguity[,] . . . [i]t demonstrates *breadth*.'"[22] It again makes perfect sense that the Commission drafted Section 51.907(g)(2) in this way. As Level 3 has explained, "Commission rules and precedent make clear that a 'terminating carrier' may at times be a 'Price Cap Carrier,' but may also be—and increasingly is—a wireless carrier, VoIP provider, or CLEC."[23] By applying the Step Six transitional rate to traffic that terminates with *any* type of affiliate of the tandem owner, so long as the tandem owner is a Price Cap Carrier, the Commission intended to ensure that the transition to bill-and-keep would keep pace with declining demand for traditional telephone service and increasing demand for alternative voice services.

AT&T further asserts that the term "affiliate" in Section 51.907(g)(2) can only be read to mean an affiliate *of a Price Cap Carrier*.[24] Level 3 does not disagree. As explained in the Complaint, and as illustrated above, the only reasonable reading of the rule requires that the term "'affiliates' comes into play whenever an AT&T Price Cap Carrier owns the tandem and *any* AT&T affiliate is the 'terminating carrier.'"[25] This again is clear from the context of the rule,

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[22] *United States v. Monsanto*, 491 U.S. 600, 609 (1989) (quoting *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 499 (1985)) (emphasis added); *see United States v. Nagin*, 810 F.3d 348, 353 (5th Cir. 2016) (observing that the statute at issue did not expressly exclude personal money judgments from the broad statutory term "personal property," and holding that such judgments were therefore authorized by the statute); *see also Whistleblower 21276-13W v. Comm'r*, 147 T.C. 121, 129-30 (T.C. 2016) (rejecting the argument that the statutory term "collected proceeds" should be limited to collections under Title 26, because Congress used the "sweeping term 'collected proceeds' as the basis for [an] award," and explaining that "[i]f Congress had wanted to limit collected proceeds to [T]itle 26 collections, it could, and would, have done so"), *appeal docketed*, No. 17-1119 (D.C. Cir. Apr. 24, 2017).

[23] Compl. ¶ 34.

[24] *See* AT&T Br. at 25.

[25] Compl. ¶ 35 (citing *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1087 (D.C. Cir. 2007)) (holding that plain meaning of one term in a regulation must be given effect in context with other terms in the regulation).

which by its terms applies only to traffic delivered by a Price Cap Carrier tandem to a terminating carrier's end office.[26] In these circumstances, a Price Cap Carrier must perform the tandem switching and transport functions for which tariffed rates are assessed since, as AT&T well knows, a LEC may charge only for services that it *actually provides*.[27]

AT&T tries to obfuscate the point further by claiming that this construction of Section 51.907(g)(2) "depends on reading the term '*affiliates*' as a reference back to 'Price Cap Carrier'" in the same manner in which AT&T is reading "terminating carrier" to mean only a "terminating *price cap* carrier."[28] That again is absurd. As explained above, Section 51.907(g)(2) applies to Price Cap Carrier tandem-switched transport access service rates. And, as just explained, only the entity that operates the tandem may charge for tandem services. By its plain terms, therefore, the rule and its Step Six transitional rate apply only where the Price Cap Carrier performs the tandem switching and transport functions.[29] Applying the rule to the traffic to which the rule

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[26] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks and citation omitted).

[27] *See Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc. For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108 ¶ 21 (2004) ("*2004 Access Charge Reform Order*") ("[O]ur long-standing policy with respect to incumbent LECs is that they should charge only for those services that they provide."); *AT&T Corp., Complainant v. All American Telephone Co., e-Pinnacle Communications, Inc., ChaseCom, Defendants*, Memorandum Opinion and Order, 30 FCC Rcd. 8958 ¶ 21 (2015) (granting damages in the amount AT&T paid defendants for services defendants did not provide).

[28] AT&T Br. at 25.

[29] AT&T's related argument that "affiliates" appears only in the rule and not the order does not permit AT&T to disregard the term's importance to the meaning of the rule. *See id.* at 22. As explained, the term "affiliates" is a common and important component of numerous regulatory schemes across the Commission's jurisdiction. *See* Compl. ¶ 30. As AT&T notes, one must

itself says it applies is not at all like "reading" terms in the rule to be limited "in the same manner" as AT&T urges, which instead interposes new terms and limitations to serve its self-interest.

Rather than giving "affiliates" its plain meaning in Section 51.907(g)(2), AT&T asserts—with no support whatsoever—that the Commission "most likely" added the phrase "or its affiliates" to account for only two narrow circumstances: those (1) in which a price cap LEC is "trying to evade the tandem transition by transferring its tandem assets to an affiliate," or (2) in "rural areas where a price cap LEC's end user is served by the tandem of a neighboring affiliate."[30] These are indeed situations in which the Step Six transitional rate applies. But, as Level 3 has shown, there are many other circumstances in which the Step Six transitional rate also applies—and many others in which it does not. Rather than the two narrow, self-serving situations theorized by AT&T, the Commission included the phrase "or its affiliates" *primarily* to ensure that the Step Six transitional rate would apply to the rapidly growing volume of traffic that terminates with non-Price Cap LEC affiliates. That interpretation is true to the statutory

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read the text of the rules together with the text of the order adopting them. *See* AT&T Br. at 18. However, that does not mean that the absence of a word that appears in the rule but not the order means one can delete the word in the rule, or interpret the word to render it meaningless. Including "affiliates" in the rule entirely aligns with the factual findings and policy behind the transition to bill-and-keep that the Commission adopted in the *Transformation Order*, which recognizes that TDM-based traffic is shrinking in favor of CMRS and IP-based alternatives, and that the transition to bill-and-keep will further the Commission's goals of eliminating competitive distortions between services, reducing opportunities for arbitrage, and incentivizing the migration from legacy to next-generation networks. *See, e.g., Transformation Order* ¶¶ 9, 34, 648, 752.

[30] AT&T Br. at 22.

definition of "affiliate,"[31] the Commission's use of the term in the rule, and the forward-looking policy objectives of the *Transformation Order*.[32]

C. Neither informal WCB staff guidance nor the *Record Refresh Notice* has any precedential value.

AT&T's heavy reliance on extra-record materials to support its wholesale rewriting of Section 51.907(g)(2) is also misplaced.[33] As explained in the Complaint, the informal WCB staff guidance cited by AT&T is not binding on the Commission.[34] It was apparently given without any participation from other interested parties, and (assuming for the sake of argument that it has been correctly described by AT&T) results in a substantive redrafting of Section 51.907(g)(2) that improperly ignores the plain meaning and purpose of the rule.[35]

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[31] 47 U.S.C. § 153(2).

[32] *See Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 260-61 (D.C. Cir. 2005) (terms in a regulation should be interpreted consistently with its regulatory objective); *Nat'l Cable Television Ass'n, Inc. v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994) (finding that the Commission must take into account "the provisions of the whole law, and . . . its object and policy" in interpreting the Cable Communications Policy Act of 1984) (internal quotation marks and citation omitted).

[33] AT&T Br. at 13.

[34] *See* Compl. ¶¶ 56-57; *see, e.g.*, *Transformation Order* App. E ¶ 15 ("[I]nformal staff guidance cannot bind the Commission."); *Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund*, Order Denying Stay Petition, 30 FCC Rcd. 12379 ¶ 9 n.24 (WCB 2016) ("It is well-established that informal staff guidance is not binding on the Commission."); *see also Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 660-61 (D.C. Cir. 2004) (discussing the "well-established view" that an agency is not bound by the informal actions of its staff).

[35] Even if the full Commission were to adopt the WCB staff's informal guidance here, which it should not do, agencies receive no deference for interpretations of their own rules that are "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted). Likewise, agencies receive no deference "when there is reason to suspect that the agency's interpretation," such as the purported informal verbal staff opinion in question here, "does not reflect the agency's fair and considered judgement on the matter in

Further, to the extent that such guidance "affect[s] subsequent [agency] acts" and has a "future effect" on a party before the agency, the Administrative Procedure Act's notice requirement was triggered, and, apparently, ignored.[36] There was no prior notice of—nor any subsequent ex parte notification regarding—the meeting with WCB staff referenced by AT&T.[37] Although tariff proceedings where the tariffs at issue have not been set for investigation are exempt from disclosure under the Commission's ex parte rules,[38] the outcome of the meeting—WCB staff's apparent endorsement of a wholesale rewriting of Sections 51.907(g)-(h)—went far beyond a "customary" meeting to "discuss the tariff filings" for administrative purposes in advance of the streamlined filing deadline or mere "interactions with 'industry groups.'"[39]

AT&T also relies on a sentence in the more recent *Record Refresh Notice*[40] as support for its wholesale rewriting of Section 51.907(g)(2). However, instead of reciting the actual text of the rule, the *Record Refresh Notice* interposes two new words in its discussion, referring to a

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question." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (quoting *Auer*, 519 U.S. at 462).

[36] *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) ("In contrast to an informal adjudication or a mere policy statement, which 'lacks the firmness of a [prescribed] standard,' an agency's imposition of requirements that 'affect subsequent [agency] acts' and have a 'future effect' on a party before the agency triggers the APA notice requirement.") (quoting *Sugar Cane Growers Coop. v. Veneman,* 289 F.3d 89, 95-96 (D.C. Cir. 2002)) (internal quotations and citation omitted).

[37] AT&T Br. at 13-14.

[38] 47 C.F.R. § 1.1204(b)(3).

[39] AT&T Br. at 13 & n.21 (citing 47 C.F.R. § 0.91(k)).

[40] *Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport and Transit*, Public Notice, 32 FCC Rcd. 6856 (2017) ("*Record Refresh Notice*").

"terminating *price cap* carrier" rather than a "terminating carrier."[41] This revised text parrots AT&T's preferred writing of the rule and the apparent informal WCB staff guidance given to Price Cap Carriers alone. But AT&T's dependence on the *Record Refresh Notice* proves too much: it confirms that one must insert additional words—"price cap"—into the text of the rule in order to permit the narrow construction that AT&T urges. The Commission did not write the rule that way. And, because it would undermine the transition to bill-and-keep and create an easily exploited loophole (which AT&T is fully exploiting), it is wholly illogical to suggest that the Commission meant for the rule to be read as though those words were in it but simply forgot to include them.[42]

Moreover, AT&T's characterization of the *Record Refresh Notice* is inaccurate.[43] The "Commission" did not "confirm" AT&T's interpretation of Section 51.907(g)(2) in the *Record Refresh Notice*. Rather, the WCB staff, acting on delegated authority, issued a non-binding notice referencing the transition for tandem-switched transport access services.[44] The discussion in the *Record Refresh Notice* therefore amounts to staff guidance, not Commission action.[45]

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[41] *See Record Refresh Notice* at 2 (emphasis added).

[42] AT&T may attempt to rely in its surreply on comments and materials submitted in response to the *Record Refresh Notice* to support its wholesale rewriting of Section 51.907(g)(2). Any such filings would also be extra-record and would have no interpretive weight on the proper interpretation of the rule as adopted by the Commission in the *Transformation Order*.

[43] *See* AT&T Br. at 17.

[44] *See generally Record Refresh Notice*.

[45] *See* 47 C.F.R. § 0.291(e) (stating that the WCB "shall not have authority to issue notices of proposed rulemaking, notices of inquiry, or reports or orders arising from either [rulemaking or investigatory proceedings]"); *Sprint Corp.*, 315 F.3d at 376 ("[The Commission] purported to act through the Common Carrier Bureau, which lacks authority under the Commission's regulations to issue notice of proposed rulemaking.").

Even then, the discussion alluding to Section 51.907(g), and, for that matter, Section 51.907(h), in the *Record Refresh Notice* is completely divorced from the actual text of the rules and, conspicuously, does not even cite those subsections.[46]

As yet additional extra-record "support" for its position, AT&T asserts that earlier this year "the [WCB] Staff issued its annual order in which it detailed the various material that LECs should include with their access filings to implement the transition, *which included the required step-down for transport and termination provided by price cap carriers when they route calls to their own price cap LEC end offices*."[47] But that is patently inaccurate. Nowhere in that order, or in the initial annual tariff filing order, did the WCB describe or interpret Section 51.907(g).[48]

As such, no stakeholder other than the Price Cap Carriers that attended the series of informal guidance meetings with WCB staff had any notice that the Step Six transition would be implemented in disregard of the plain language of Section 51.907(g)(2) until the last minute—when Price Cap Carriers filed streamlined tariffs that would be "deemed granted" absent an investigation by the same regulators who participated in this closed-door rewriting of the rule. These instances of informal staff guidance, even if they did occur as AT&T claims, hold no interpretive weight.[49]

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[46] *See Record Refresh Notice* at 2-3.

[47] AT&T Br. at 13 (emphasis added) (referencing *Material to be Filed in Support of 2017 Annual Access Tariff Filings*, Order, 32 FCC Rcd. 3168 ¶ 15 (WCB 2017)) ("April 2017 Access Tariff Order").

[48] *See generally* April 2017 Access Tariff Order; *July 1, 2017 Annual Access Charge Tariff Filings*, Order, 32 FCC Rcd. 1918 (WCB 2017).

[49] Accordingly, AT&T cannot excuse its violation of Section 201(b) or shield itself from retroactive liability on the theory that "it merely followed the existing guidance from the Commission and its staff." *See* AT&T Br. at 37.

D. The Public Notice denying Level 3's June 23 Petition to Reject or Suspend and Investigate did not prejudge the merits in this Section 208 proceeding.

AT&T also wrongly suggests that the July 2017 Public Notice notifying parties that the WCB would not reject or suspend and investigate the tariffs of AT&T and other Price Cap Carriers should be given dispositive weight here.[50] This public notice did not prejudge the merits of Level 3's Complaint and should be given no weight. AT&T filed its tariffs pursuant to streamlined filing under Section 204(b) of the Act. Commission precedent makes clear that the streamlined tariff filing provisions do not preclude post-effective review of a tariff, including via the Section 208 complaint process.[51] Giving undue weight to a decision not to reject or suspend and investigate a tariff would render post-effective review via the Section 208 formal complaint process meaningless and amount to a denial of due process.[52]

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[50] *Protested Tariff Transmittals, No Actions Taken*, Public Notice, 32 FCC Rcd. 5500 (2017) ("*No Actions Taken Public Notice*"). Further, AT&T's claim that Level 3's Petition to Reject or Suspend and Investigate the AT&T tariff filings at issue "was not timely filed" is without merit. *See* AT&T Br. at 16. Level 3 explained in the Petition that because only the June 16 tariff transmittals established specific rates for the classes of traffic described, "it is only possible to determine whether AT&T's rate restructuring complies with Section 51.907(g)(2) by reviewing the June 16 transmittals." Petition of Level 3 to Reject or Suspend and Investigate, WC Docket No. 17-65, at 4-5 (filed June 23, 2017) (Compl. Ex. 13). Further, at no point did the WCB suggest that Level 3's Petition was untimely. *See generally No Actions Taken Public Notice*.

[51] *See Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd. 2170 ¶ 52 (1997) ("We will continue to rely additionally on post-effective tariff review, including the section 208 complaint process and in section 205 tariff investigations.").

[52] *See Graphnet, Inc., Complainant v. AT&T Corp., Defendant*, Memorandum Opinion and Order, 17 FCC Rcd. 1131 ¶ 43 (2002) ("Specifically, contrary to Graphnet's assertion, the Commission's decisions not to reject or suspend Graphnet's tariff are not dispositive of the section 201(b) claim. Those decisions merely constitute a determination by the Commission that the challenged tariff is not patently unlawful. They do not preclude AT&T from initiating a section 208 complaint proceeding to determine whether the tariff is in fact lawful."); *see also Qwest Communications Company, LLC, Complainant v. Northern Valley Communications, LLC, Defendant*, Memorandum Opinion and Order, 26 FCC Rcd. 8332 ¶ 14 (2011) ("Contrary to Northern Valley's assertion, the fact that the Wireline Competition Bureau did not act on Qwest's Petition to Reject or, in the Alternative, Suspend and Investigate the Tariff presents no

III. AT&T'S INTERPRETATION OF SECTION 51.907(g)(2) IS A TRANSPARENT ATTEMPT TO MAXIMIZE REVENUE FROM ITS NON-PRICE CAP CARRIER AFFILIATES AT THE EXPENSE OF THE PUBLIC INTEREST.

A. Section 51.907(g)(2) is not the "AT&T and Verizon access charge preservation rule."

Far from reflecting the policy objectives of the *Transformation Order*, AT&T's wholesale rewriting of Section 51.907(g)(2) benefits essentially two companies: AT&T and Verizon. Both entities have market-leading Price Cap Carrier and CMRS affiliates, and AT&T is migrating millions of wireline subscribers to its U-Verse platform.[53] AT&T has every incentive to shield calls terminated by its affiliates from the Step Six transitional rate. But the Commission did not adopt Section 51.907(g)(2) as a relief act to enable AT&T and Verizon to continue to collect already above-cost charges for tandem-switched transport access services routed to their non-Price Cap Carrier affiliates. The Commission did just the opposite.

As demonstrated in the Complaint, the amount of CMRS traffic is already large and continues to grow at the expense of ILEC traffic.[54] While AT&T seeks to portray the Commission as largely oblivious to these marketplace trends,[55] the record proves otherwise. The

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impediment to granting the Complaint. As Northern Valley acknowledges, a petitioner's burden of proof when seeking rejection or suspension of a CLEC tariff is more demanding than a complainant's burden in a section 208 complaint proceeding.").

[53] *See* Compl. ¶ 14 (citing AT&T INC., A GLOBAL LEADER IN TELECOMMUNICATIONS, MEDIA, & TECHNOLOGY: 2016 ANNUAL REPORT 16 (2016) ("AT&T 2016 REPORT"), https://investors.att.com/~/media/Files/A/ATT-IR/financial-reports/annual-reports/2016/att-ar2016-completeannualreport.pdf.

[54] *See* Compl. ¶¶ 11-15. For example, from the end of 2011 to the end of 2016, AT&T's total mobile subscribers increased from 103.2 million to 134.8 million. AT&T INC., GETTING TO THE FUTURE FIRST: 2011 ANNUAL REPORT 30 (2011), https://investors.att.com/~/media/Files/A/ATT-IR/financial-reports/annual-reports/2011/ar2011-annual-report.pdf; AT&T 2016 REPORT 22.

[55] *See* AT&T Br. at 5-6.

Commission recognized in the *Transformation Order* that this trend had already taken root. Accordingly, the Commission premised its reforms, including the Step Six and Step Seven transitions, on evidence that "demand for traditional telephone service [had] fall[en], with consumers increasingly opting for wireless, VoIP, texting, email, and other phone alternatives"[56] and that—particularly in light of this changing demand—the existing intercarrier compensation regime, was "unfair for consumers, with hundreds of millions of Americans paying more on their wireless and long distance bills than they should in the form of hidden, inefficient charges."[57]

When it adopted the *Transformation Order*, the Commission was also well aware that certain Price Cap Carriers—AT&T among them—were perpetuating such "hidden, inefficient charges" by avoiding or delaying direct connections between third parties and CLEC and CMRS affiliates in order to pump as much affiliate-bound traffic through legacy ILEC tandem switches as possible.[58] Given AT&T's bottleneck control over terminating access, together with its ability to leverage affiliate infrastructure and the incentive of its publicly traded parent to harmonize the

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[56] *Transformation Order* ¶ 648.

[57] *Id*. ¶ 9.

[58] *See, e.g.*, Letter from Thomas Jones & Nirali Patel, Counsel for Cbeyond, Inc., Integra Telecom, Inc., and tw telecom inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket Nos. 07-135, 10-90, & 05-337, GN Docket No. 09-51, at 3 (July 29, 2011) ("July 2011 Cbeyond Letter") ("Peerless Network ('Peerless'), a competitive tandem transit provider, recently told the Commission that in many markets in the AT&T incumbent LEC territory, AT&T's long distance affiliates 'have consistently refused' to interconnect with Peerless and AT&T's wireless affiliate has refused or delayed interconnection with Peerless. Instead, 'AT&T will deliver traffic to other carriers from any of its affiliates . . . only through interconnections to AT&T [incumbent] LEC tandems.'" (quoting Petition to Deny of Peerless Network, Inc., WT Docket No. 11-65, at 7-8 (May 31, 2011) ("Peerless Petition")); *see also* Letter from Thomas Jones & Nirali Patel, Counsel for Cbeyond, Inc., Integra Telecom, Inc., and tw telecom inc., to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45; WC Docket Nos. 03-109, 07-135, 10-90, 05-337, 11-119; GN Docket No. 09-51, Attach. A at 7 (Oct. 3, 2011).

activities of its subsidiaries, it was easy to see how "AT&T . . . created a . . . monopoly for this traffic."[59] This wasteful scheme[60] is a shell game AT&T has played for years.[61]

Given this record, it was not only logical but essential for the Commission to include the term "affiliates" in Section 51.907(g)(2). By doing so, the Commission ensured that the growing volumes of CMRS and VoIP traffic terminated by Price Cap Carrier affiliates would be part of the transition, and it prevented Price Cap Carriers from continuing to benefit from the outdated intercarrier compensation regime at the expense of customers. This straightforward application of the term "affiliates" thus serves the stated objectives of the *Transformation Order* to (1)

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[59] *See* July 2011 Cbeyond Letter at 3.

[60] *See* AT&T Br. at 35.

[61] *See* July 2011 Cbeyond Letter at 4 ("According to Peerless, AT&T also restricts competition in the tandem transit service market in other ways, including by (1) charging its wireless affiliate lower rates for tandem transit service than it charges non-affiliates; (2) 'oppos[ing] efforts to modify the Local Exchange Routing Guide (LERG) to permit an end office carrier to designate more than one homing tandem'; and (3) refusing to recognize Peerless or another alternative tandem transit provider as the sole homing tandem for select competitive LEC and wireless telephone number blocks. These strategies have the effect of giving AT&T the ability to unilaterally set prices far above cost for the significant volume of traffic at issue.") (quoting Peerless Petition at 10); *see* Peerless Petition at 7-8 ("AT&T has made it very difficult for wholesale carriers to interconnect with its non-incumbent LEC switches for purposes of terminating traffic, especially in the markets where it is also the incumbent LEC. Peerless has repeatedly sought interconnection with AT&T affiliates to terminate traffic to their switches. AT&T Corp. and its CLEC affiliates have consistently refused these requests. AT&T Mobility has sometimes refused and sometimes accepted direct connections, but has made the process extremely difficult and slow. In many cases, Peerless has experienced delays of nine to twelve months in provisioning trunk connections to AT&T Mobility switches (which, for other carriers, generally take a few weeks), both for new connections and for augmentation of existing trunk groups. Of course, each of these delays permits more traffic to pass over the AT&T LEC tandem switch, generating more revenue for AT&T, while Peerless is unable to complete traffic over its direct connections."); *see also* Letter from Charles W. McKee, Vice President, Federal and State Regulatory, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51, at 2 (Oct. 3, 2011) ("Sprint Oct. 2011 Letter") (warning that "locking carriers into legacy ILEC network architectures and interconnection at ILEC end offices . . . will strongly discourage or even preclude the more efficient regional interconnection arrangements typically used for non-voice IP traffic.").

eliminate competitive distortions between services;[62] (2) reduce opportunities for arbitrage;[63] and (3) incentivize the migration from legacy to next-generation networks.[64]

AT&T's strained efforts to cabin the meaning of "affiliates" to two narrow circumstances only reinforces the extent to which it is trying to rewrite the rule to serve its own interests. It enables AT&T to continue to force CMRS affiliate-bound traffic through legacy tandems, at which point it can apply inflated, above-cost access charges not subject to the transition to bill-and-keep. This result contravenes key policy objectives identified by the Commission in the *Transformation Order*: it raises customer costs; incentivizes inefficient network design and the maintenance of legacy systems rather than investment in next-generation networks; and delays indefinitely a transitional step to bill-and-keep that the Commission already determined to take.[65] While all of this may be good for AT&T, it clearly harms the public interest and is not (and cannot be) what the Commission intended.[66]

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[62] *See, e.g.*, *Transformation Order* ¶ 9 ("The [existing ICC] system creates competitive distortions because traditional phone companies receive implicit subsidies from competitors for voice service, while wireless and other companies largely compete without the benefit of such subsidies.").

[63] *See, e.g.*, *id.* ("We need a more incentive-based, market-driven approach that can reduce arbitrage and competitive distortions by phasing down byzantine per-minute and geography-based charges."); *id.* ¶ 752 ("[A] bill-and-keep approach better reflects the incremental cost of termination, reducing arbitrage incentives.").

[64] *See, e.g.*, *id.* ¶ 648 ("[T]he existing intercarrier compensation system . . . is fundamentally in tension with and a deterrent to deployment of all IP networks."); *id.* ¶ 34 ("Bill-and-keep has worked well as a model for the wireless industry; is consistent with and promotes deployment of IP networks . . . and best promotes our overall goals of modernizing our rules and facilitating the transition to IP.").

[65] *See* Compl. ¶¶ 36-52.

[66] AT&T contends that Level 3's policy arguments are "irrelevant and also misguided." AT&T Br. at 30. But, as the record clearly shows, these are *not* just Level 3's policy arguments; they are also the policy objectives established by the Commission itself in the *Transformation Order*.

B. AT&T's claim that its affiliates cannot recover each other's tandem costs is overstated and irrelevant.

AT&T further contends that applying Section 51.907(g)(2) as adopted by the Commission would be destabilizing because it would prevent the CMRS carrier from recovering costs.[67] In fact, it was entirely logical for the Commission to apply the Step Six transitional rate in Section 51.907(g)(2) whenever a Price Cap Carrier's affiliate terminates the call. Because the Price Cap Carrier also has a relationship with the end user customer in these circumstances, it can recover its costs from the customer to the extent that market conditions permit.

Indeed, AT&T concedes that the rule shifts the Price Cap Carrier's tandem charges to bill-and-keep for calls to wireline customers served by an affiliated Price Cap Carrier. The Commission has already determined those charges cannot be recovered from other carriers and must be recovered from end users. AT&T has not even argued, much less shown, that it is more difficult to recover such charges in the wireless context than in the context of wireline calls.

In any event, AT&T's claim that its Price Cap Carriers must recover costs from their CMRS affiliates is a makeweight, as these entities are wholly owned subsidiaries of the same parent company.[68] AT&T knows that when a legacy ILEC subsidiary that enjoys high profit margins is losing customers, it is in the company's interest to make up for as much lost volume as possible by directing as much affiliate traffic as possible through the legacy network. AT&T Inc. is responsible for the aggregate success of its subsidiaries; costs need not be recovered from left pocket to right.

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[67] *See* AT&T Br. at 28; *see also* AT&T's Opposition to Petitions of Level 3 and Sprint Corporation to Reject or to Suspend and Investigate AT&T Tariff Filings, WC Docket No. 17-65, at 6 n.18 (filed June 27, 2017) (Compl. Ex. 14).

[68] *See* Compl. ¶¶ 48-52, Ex. 12.

In addition, there are practically no tandem costs for AT&T to recover. The Commission found six years ago that the incremental costs of tandem switching are negligible and that the costs of switching via next-generation networks are even lower.[69] Given these *de minimis* costs, Price Cap Carriers' comparatively high access charges, and the fact that a called party, too, benefits from a call, the Commission adopted rules to transition tandem-switched transport access service charges to bill-and-keep to "reveal the true cost of the network to potential subscribers by limiting carriers' ability to recover their own costs from other carriers and their customers."[70] AT&T also complains that, at Step Six, "[a] price cap LEC would have no practical means of recovering its tandem costs through a CMRS affiliate's end user customer charges."[71] But as shown, AT&T's actual costs for this service are negligible and, in any event, the argument that the Commission should protect cost recovery among wholly owned subsidiaries of a single, sophisticated parent company rings hollow. And, because AT&T has a relationship with the end user customer in these instances, it can recover its costs from the customer where market conditions permit.

AT&T's contention that the proper interpretation of Section 51.907(g)(2) somehow discriminates against *AT&T and Verizon* is even more dubious. Burdened by their market-leading—and fantastically profitable[72]—CMRS providers, the story goes, AT&T and Verizon

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[69] *See id.* ¶ 47 n.80.

[70] *Transformation Order* ¶¶ 744-745 (also finding that "the most efficient termination charge is less than incremental cost, and could be negative").

[71] AT&T Br. at 28.

[72] Wireless EBIDTA for AT&T set a record in the second quarter of 2017. *See* Kinsey Grant & Chris Nolter, *AT&T Beats Q2 Earnings Forecasts, Hits Record Wireless Margins as Competition Intensifies*, TheStreet, July 25, 2017, https://www.thestreet.com/story/14242281/1/at-amp-t-stock-pops-on-second-quarter-earnings-beat.html.

would face discrimination because "a wireless carrier like AT&T would be expected to recover its LEC affiliate's tandem costs from its wireless end users, while . . . wireless competitors that have no LEC affiliates, like T-Mobile and Sprint, would not."[73] There is no merit in this assertion. Just because a regulatory scheme permits one affiliate to recover costs from another affiliate does not mean that such cost recovery actually occurs.[74] AT&T affiliates can charge each other for services at lower rates than they offer to third parties.[75] In fact, AT&T Price Cap Carriers effectively have been subsidizing the prices of their CMRS services for years.[76] Meanwhile, non-Price Cap Carrier-affiliated CMRS competitors like T-Mobile and Sprint pay full freight to terminate traffic to customers in AT&T's ILEC region, the same type of discrimination Level 3 experiences.[77] And because they lack Price Cap Carrier affiliates, T-Mobile and Sprint (like Level 3) do not have the built-in access charge revenue preservation

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[73] AT&T Br. at 28.

[74] *See, e.g.*, 47 C.F.R. § 51.3 (allowing for privately negotiated interconnection agreements); *Transformation Order* ¶ 739 ("The transition we adopt sets a default framework, leaving carriers free to enter into negotiated agreements that allow for different terms."); *id* ¶ 812 ("[C]arriers remain free to enter into negotiated agreements that differ from the default rates established above, consistent with the negotiated agreement framework that Congress envisioned for the 251(b)(5) regime to which access traffic is transitioned.").

[75] *See* July 2011 Cbeyond Letter at 4 ("AT&T also restricts competition in the tandem transit service market in other ways, including by . . . charging its wireless affiliate lower rates for tandem transit service than it charges non-affiliates.").

[76] This reality was not lost on the Commission. *See Transformation Order* ¶ 9 ("The [existing intercarrier compensation] system creates competitive distortions because traditional phone companies receive implicit subsidies from competitors for voice service, while wireless and other companies largely compete without the benefit of such subsidies."); *see also* ¶ 34 ("Bill-and-keep has worked well as a model for the wireless industry; is consistent with and promotes deployment of IP networks; *will eliminate competitive distortions between wireline and wireless services*; and best promotes our overall goals of modernizing our rules and facilitating the transition to IP.") (emphasis added).

[77] *See* Compl. ¶¶ 65-70.

mechanism that AT&T *still* exploits by flouting the correct interpretation of Section 51.907(g)(2).[78]

Finally, rather than discriminating between wireless carriers that have a Price Cap Carrier affiliate and those that do not, the correct reading of Section 51.907(g)(2) levels the playing field. No wireless carrier other than those affiliated with AT&T or Verizon can supplement its revenues with charges based on inefficient routing through affiliates. The transitional steps set forth in Section 51.907(g)-(h) were designed to put an end to exactly this sort of harmful conduct.[79]

C. The transitional rules, including Step Six, apply to VoIP-PSTN traffic.

AT&T attempts to shield additional traffic from Section 51.907(g)(2) by asserting that the Commission has not yet determined whether VoIP providers offer "telecommunications services."[80] Thus, AT&T contends, VoIP providers cannot be "terminating carriers" under the

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[78] Sprint Oct. 2011 Letter at 1 ("If [a uniform rate of $0.0007 is] actually realized, these expense savings would also do much to address the competitive inequity of the current broken regulatory regime, which permits ILECs to impose access charges when terminating traffic from wireless carriers, but prohibits wireless carriers from imposing access charges when terminating traffic from ILECs.").

[79] For these reasons, AT&T's contention that its implementation of Section 51.907(g)(2) is not unreasonably discriminatory in violation of Section 202(a) of the Communications Act has no merit. *See* AT&T Br. at 37-40. As explained, AT&T can recover costs from end-user customers to the extent permitted by market conditions. Applying the rule as intended by the Commission helps to level the playing field as part of a reasonable and appropriate transition to bill-and-keep.

[80] AT&T claims that "the Commission explicitly stated that it was not deciding that VoIP providers are common carriers." *Id*. at 25. A reading of the cited text reveals that the Commission recognizes that (1) interconnected VoIP is a "substitute[] for traditional voice telephone services" since "'[i]nterconnected VoIP subscriptions increased by 22 percent, while switched access lines decreased by 10 percent,'" from 2008 to 2009, and (2) its "authority to promote universal service in this context does not depend on whether interconnected VoIP services are telecommunications services or information services under the Communications Act." *Transformation Order* ¶ 63 (citation omitted); *see id.* ¶¶ 68-69.

rule.[81] AT&T further asserts that the *Sprint Communications Co. v. Lozier* decision, which affirms Section 251(b)(5)'s applicability to all "traffic exchanged over PSTN-facilities that originates and/or terminates in IP format,"[82] "does not establish that the Commission exercised that authority in the *Transformation Order* as it relates to this price cap LEC tandem traffic."[83] Both of these claims are inapposite.

To begin with, it makes no difference whether AT&T's VoIP affiliate is a terminating carrier for purposes of Section 51.907(g)(2). If it is not, then in cases where AT&T's Price Cap Carrier hands off the traffic to the VoIP affiliate (which, as shown, would always be true for calls governed by Section 51.907(g)(2)), the AT&T Price Cap Carrier would be the terminating carrier. The Step Six transitional rate would therefore apply.

Moreover, in the *Transformation Order*, the Commission expressly exercised its Section 251(b)(5) authority to "bring[] all VoIP-PSTN traffic within the section 251(b)(5) framework."[84] The Commission also affirmed that the "intercarrier compensation framework for VoIP-PSTN traffic *will apply prospectively, during the transition between existing intercarrier compensation rules and the new regulatory regime . . . and is subject to the reductions in intercarrier compensation rates required as part of that transition*."[85] The Commission thus treats VoIP-PSTN traffic no differently from any other traffic subject to the bill-and-keep transition in

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[81] AT&T Br. at 25-26.

[82] *Sprint Commc'ns Co., L.P. v. Lozier,* 860 F.3d 1052, 1057 n.4 (8th Cir. 2017) (quoting *Transformation Order* ¶ 940).

[83] AT&T Br. at 26 n.55.

[84] *Transformation Order* ¶ 943.

[85] *Id.* ¶ 945 (emphasis added).

Section 51.907. As such, "'traffic exchanged over PSTN facilities that . . . terminates in IP format'"[86] is subject to the Step Six transitional rate where an AT&T affiliate terminates traffic in IP format after it traverses an AT&T Price Cap Carrier's tandem. This further reinforces that the Commission was aware of the increasing volume of such calls in the marketplace and included the term "affiliates" in Section 51.907(g)(2) to ensure that the rule's Step Six transitional rate would apply to such traffic when delivered by Price Cap Carriers.

IV. AT&T'S OTHER ARGUMENTS SHOULD BE REJECTED.

A. The "network edge" issues raised in the *Transformation NPRM* and *Record Refresh Notice* have no bearing on the proper interpretation of Section 51.907(g)(2).

AT&T contends that Level 3's straightforward interpretation of Section 51.907(g)(2) "assumes that the Commission has already decided important and difficult questions that are actually still at issue" in the *Transformation FNPRM* and recent *Record Refresh Notice*, "[i]n particular . . . where to set the 'network edge.'"[87] This is another obfuscation that again mischaracterizes the record.

Level 3 does not dispute that important questions regarding the transition to bill-and-keep have yet to be answered by the Commission, including whether and how to define a "network edge" applicable to the transition of rate elements not covered by the transitional rules adopted in 2011. But the definition of the network edge for traffic traversing an AT&T Price Cap Carrier's tandem switch and terminating with an AT&T affiliate—whether a Price Cap Carrier, a CLEC, CMRS provider, or a VoIP provider—has *already been decided* in the *Transformation Order*.[88]

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[86] *Id.* ¶ 940 (citation omitted).

[87] AT&T Br. at 4.

[88] The *Transformation FNPRM* defines "network edge" as "the point [at] where bill-and-keep applies." *Transformation FNPRM* ¶ 1320. In its brief, AT&T similarly describes the network

Specifically, the Commission made clear that: "As discussed in the [*Transformation*] *Order*, we expect that the reforms adopted today will not upset existing interconnection arrangements or obligations during the transition."[89] Thus, for Steps Six and Seven, the Commission utilizes the historical definitions of "network edge" applied in the reciprocal compensation framework. At Step Six, the network edge is the end office. There, bill-and-keep applies, and the terminating carrier cannot charge other carriers for transport and termination.[90] At Step Seven, the network edge for applicable traffic is set at the tandem.[91] Comments filed in response to the *Transformation FNPRM* confirm this understanding of the Commission's decisions in the *Transformation Order*, as well as the understanding that the *Transformation FNPRM* sought comment on how to define the network edge for traffic *not* subject to Sections 51.907(g)-(h).[92]

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edge as "the point beyond which the terminating provider cannot charge other carriers for transport and termination." AT&T Br. at 4.

[89] *Transformation FNPRM* ¶ 1315.

[90] *See* 47 C.F.R. § 51.907(g)(1) ("Each Price Cap Carrier shall, in accordance with a bill-and-keep methodology, refile its interstate access tariffs and any state tariffs, in accordance with § 51.905(b)(2), removing any intercarrier charges for terminating End Office Access Service."). Contrary to AT&T's mischaracterization, Level 3 has never argued that at Step Six the network edge is the tandem.

[91] *See id.* § 51.907(h) ("Beginning July 1, 2018, notwithstanding any other provision of the Commission's rules, each Price Cap carrier shall, in accordance with bill-and-keep, as defined in § 51.713, revise and refile its interstate switched access tariffs and any state tariffs to remove any intercarrier charges applicable to terminating tandem-switched access service traversing a tandem switch that the terminating carrier or its affiliate owns.").

[92] *See, e.g.*, Comments of CenturyLink, WC Docket No. 10-90, 07-135, 05-337, 03-109; WT Docket No. 10-208; GN Docket No. 09-51; CC Docket Nos. 01-92, 96-45, at 21-22 (Feb. 24, 2012) ("And CenturyLink agrees with another fundamental premise of the *FNPRM* section on network edges and POIs -- that it expects that current, albeit somewhat distinct, edge and POI concepts in effect in the historic reciprocal compensation and access frameworks will continue during the transition to bill and keep.") (citing *Transformation FNPRM* ¶ 1315); Reply Comments of Comcast Corporation, WC Docket No. 10-90, 07-135, 05-337, 03-109; WT

B. Level 3 has no choice but to apply Section 51.907(g)(2) in the same manner as AT&T pending resolution of this complaint proceeding.

Because Level 3's most recent access tariff implements the Step Six transitional rate in the same way that "AT&T, other price cap LEC and benchmark CLEC carriers" do, AT&T contends that if its tariffs "violate Section 202(a), then so too does the tariff filed by Level 3."[93] This argument is also incorrect. Level 3 filed a tariff that mirrors the AT&T tariffs pursuant to Section 61.26 of the Commission's rules, 47 C.F.R. § 61.26, (i.e., the "mirroring" or "benchmark" rule). CLEC rates that are at or below the benchmark rate of the competing ILEC

Docket No. 10-208; GN Docket No. 09-51; CC Docket Nos. 01-92, 96-45, 21-22, at 4 (Mar. 30, 2012) ("[D]uring the transition to a bill-and-keep regime for terminating voice traffic [] Comcast agrees with other commenters that there is no need for the Commission to modify the *status quo* [of current POI and "network edge" rules] . . . . The record contains ample evidence from a variety of commenting parties that 'existing interconnection arrangements and network engineering practices are flexible enough to address changes resulting from the adoption of bill-and-keep.' Indeed, '[t]here is nothing inherent in the fact that the rate levels are approaching and eventually become zero that would dictate a change in POI configurations.' Accordingly . . . imposing new or different requirements now 'would impose unnecessary costs during a transitional period.'") (internal citations to comments of Cbeyond, *et al.*, XO Communications, LLC, and National Cable & Telecommunications Association omitted); Comments of Cbeyond, EarthLink, Integra Telecom, and tw telecom, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket Nos. 09-51, WT Docket No. 10-208, at 15-17 (Feb. 24, 2012) (stating that "[t]he Commission should not alter its current interconnection rules or establish a network edge" because doing so would (1) deprive CLECs of their statutory right under Section 251(c)(2) to interconnect "at any technically feasible point"; (2) there is no need to establish new rules that would alter existing TDM interconnection arrangements, since they will ultimately be replaced by IP interconnection arrangements; and (3) "existing interconnection arrangements and network engineering practices are flexible enough to address changes resulting from the adoption of bill-and-keep"); Reply Comments of Bandwidth.com, Inc., WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51, at 8 (Mar. 30, 2012) ("Fundamentally, the network 'edge' concept is based upon historic PSTN-centric opportunities to capture outsized returns from a captive market. . . . Thus, one could readily surmise that AT&T [in proposing network edge rules] is simply preserving wholly obsolete cost recovery mechanisms.").

[93] AT&T Br. at 39 n.77.

are presumptively just and reasonable.[94] Level 3's tariff reflects nothing more than the ILEC tariffs to which it benchmarks.

In any event, Level 3's tariff is not at issue in this dispute,[95] nor, for that matter, are all the other Price Cap Carrier or benchmarking CLEC tariffs that adopt the interpretation of Section 51.907(g)(2) reflected in AT&T's tariffs.[96] Level 3 believes that *all* carriers subject to Section 51.907(g)(2) or the mirroring requirement should apply the Step Six transitional rate as the Commission intended and looks forward to mirroring AT&T's tariffs when those tariffs are reformed.

C. AT&T's assertion that the Commission lacks jurisdiction over AT&T, Inc. in this proceeding disregards Section 411 of the Communications Act.

In its Answer, AT&T denies that AT&T Inc. is "a proper defendant" because the "Commission lacks jurisdiction over AT&T Inc. in this proceeding."[97] This too is incorrect.

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[94] *See Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923 ¶ 3 (2001); *2004 Access Charge Reform Order* ¶ 4 ("The Commission set a benchmark rate for competitive LEC access rates and concluded that competitive LEC access rates at or below the benchmark would be presumed just and reasonable. Under the rules the Commission adopted, a competitive LEC may not tariff interstate access charges above the higher of (1) the competing incumbent LEC rate, or (2) the benchmark rate or the lowest rate the competitive LEC tariffed for interstate access service within the six months preceding the effective date of the order, whichever is lower.").

[95] AT&T's assertions regarding Level 3's tariff are not only irrelevant, but also, to the extent they are counterclaims, are barred by Section 1.725 of the Commission's rules. *See* 47 C.F.R. § 1.725 ("Cross-complaints seeking any relief within the jurisdiction of the Commission against any carrier that is a party (complainant or defendant) to that proceeding are expressly prohibited."). In all events, Level 3 denies any counterclaim regarding any of its tariffs.

[96] *See, e.g.*, AT&T Br. at 15 ("[A]ll price cap carriers implemented Section 51.907(g) consistently and as determined by the Commission's Staff's guidance"). That AT&T is not the only Price Cap Carrier to interpret Section 51.907(g)(2) in this manner does not mean AT&T can avoid defending its access tariffs against Level 3's Complaint.

[97] AT&T Answer ¶ 4.

Enforcement actions within the Commission's jurisdiction, such as this complaint proceeding, may include as a party "all persons interested in or affected by the charge, regulation, or practice under consideration," and the Commission may enforce its orders against such persons.[98] Courts have upheld the Commission's broad interpretation of this authority.[99] Moreover, despite AT&T's argument that AT&T Inc. "is not a common carrier," a party included in such a proceeding need not been a carrier at all, let alone a common carrier.[100] For example, and directly applicable to AT&T Inc., the Commission has relied on its Section 411 jurisdiction to join parent companies in proceedings involving subsidiaries.[101] There is thus no question that the Commission has jurisdiction in this complaint proceeding over AT&T Inc., the parent of each

[98] 47 U.S.C. § 411(a).

[99] *See, e.g.*, *Ambassador, Inc. v. United States*, 325 U.S. 317, 325-26 (1945) (rejecting the need for a common law determination of "agency" to join a party where Section 411 gives a broad statutory right of joinder); *see also General Services Administration, Complainant v. American Telephone and Telegraph Company and the Associated Bell System Companies, Defendants*, Order, 2 FCC Rcd. 3574 n.20 (1987) ("We note that Section 411 of the Communications Act, 47 U.S.C. § 411, grants broad authority to the Commission as to parties who may be brought before it in any proceeding.").

[100] *See, e.g.*, *UCN, Inc., Transferee, Transtel Communications, Inc. Tel America of Salt Lake City, Inc. Extelcom, Inc. Transferors, Joint International and Domestic Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Transfer Certain Assets of Authorized International and Domestic Carriers*, Order on Reconsideration, 20 FCC Rcd. 16711 ¶ 9 (2005) ("[W]e note that the Commission retains the authority to join non-common carriers for the enforcement of the provisions of the Act as necessary.").

[101] *See, e.g., Petition by Telecable Corp. to Stay Construction or Operation of a CATV System in Bloomington & Normal, Ill., by G.T. & E. Communications, Inc.*, Memorandum Opinion and Order, 18 F.C.C.2d 348 ¶ 5 (1969) ("It would appear essential that the parent company, which proposes to finance the CATV facilities and which holds voting control of both the telephone and cable companies, be made part of such an inquiry; it is the parent company which may be in a position to establish, maintain, and coordinate such policies.").

of the wholly owned Price Cap Carrier, CLEC, CMRS, and VoIP subsidiaries subject to or implicated by Section 51.907(g)(2), or that AT&T Inc. is a proper defendant.

D. AT&T's view about the relative "magnitude" of overcharges Level 3 has estimated is inaccurate and no excuse for non-compliance with Section 51.907(g)(2).

AT&T attempts to diminish the importance of this dispute by asserting that "the magnitude of the [overcharges] Level 3 claims are unlikely to have any material effect on competition or broadband investment."[102] Perhaps to a behemoth with a market capitalization of over $236 billion,[103] the magnitude of Level 3's claims[104] seems like petty cash. But to companies like Level 3, and, for example, Sprint—far from small, but ten times smaller than AT&T[105]—these overcharges mean paying large sums of money for services provided over long-since paid-for, obsolescing facilities that could instead be invested in building out next-generation networks. As Sprint observed just weeks before the Commission adopted the *Transformation Order*, "[i]f [the step-down to $0.0007 is] actually realized, Sprint will be able to

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[102] AT&T Br. at 34. As AT&T is aware, any discussion of the appropriate measure of damages is premature. Level 3 has requested that the Commission first adjudicate the issues raised in the Complaint and then determine Level 3's damages in a bifurcated, subsequent proceeding, pursuant to 47 C.F.R. § 1.722(d). Compl. ¶¶ 5-6.

[103] *See* AT&T Historical Market Cap Data, Ycharts, https://ycharts.com/companies/T/market_cap (showing that AT&T Inc. had a market capitalization of $236.39 billion on October 10, 2017, the date of AT&T's Answer).

[104] Compl. ¶ 41.

[105] *See* Level 3 Communications Historical Market Cap Data, Ycharts, https://ycharts.com/companies/LVLT/market_cap (showing that Level 3 had a market capitalization of $20.13 billion on October 10, 2017, the date of AT&T's Answer); Sprint Historical Market Cap Data, Ycharts, https://ycharts.com/companies/S/market_cap (showing that Sprint had a market capitalization of $28.54 billion on October 10, 2017, the date of AT&T's Answer).

invest such expense savings in enhancing its network and expanding its provision of wireless broadband services[.]"[106]

Due to AT&T's wholesale rewriting of Section 51.907(g)(2), the scheduled step-down—intended to eliminate competitive distortions between services, reduce opportunities for arbitrage, and incentivize the migration from legacy to next-generation networks[107]—has yet to occur for a critical and growing mass of traffic. This is not the result that the Commission intended under the rule. AT&T's cynical view about the adverse effects of its overcharges on Level 3 and other carriers is inaccurate and in no way excuses noncompliance with the plain language of Section 51.907(g)(2). It also disregards the other important policy objectives and public interest benefits that the Commission intended to achieve through the transition to bill-and-keep.

V. CONCLUSION

For the foregoing reasons, the Commission should find AT&T's tariffs unlawful, grant the relief requested in Level 3's Formal Complaint, and establish a schedule for hearing Level 3's damages claims. Moreover, because this proceeding involves no factual disputes, and neither party has requested discovery, the Commission should do so expeditiously.

[106] Sprint Oct. 2011 Letter at 2.

[107] *See supra* note 29 and p. 22.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Samuel Eckland, hereby certify that on October 24, 2017, I caused a true and correct copy of the foregoing Reply Brief of Level 3 Communications, LLC to be served by email to the following:

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